Polar Light Sdn Bhd & Anor v The Owners of the Ship 'MV Soon Yu'

HIGH COURT (MIRI) — ADMIRALTY IN REM NO MR 3 OF 1994
SULAIMAN DAUD JC
17 NOVEMBER 2000

Shipping and Navigation *— Carriage of goods — Damage and/or loss of goods — Whether defence of peril of the sea or the act of God available to the defendant — Whether loss of goods attributed to act of God*

The plaintiffs claim damages against the defendant in the sum of RM70,702 together with interest thereon for the loss of cargo comprising 38 crates of plywood. The lost cargo were part of the consignment of plywood arranged by the first plaintiff to be shipped on board the defendant's vessel, MV Soon Yu ('the said vessel'), from Miri destined for the second plaintiff at Labuan. The plaintiffs alleged that the defendant breached the agreement entered between them in failing to deliver 38 crates of plywood to the second plaintiff or to return the same to the first plaintiff. The defendant specifically relied on the defence of peril of the sea or alternatively of the act of God. The issues were whether: (i) whether or not the defence of peril or danger of the sea as provided in the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 ('the 1960 Regulations') and the Rules Relating to the Bills of Lading ('the Rules') as set out in the Schedule to the Regulations apply to the case; and (ii) if such defence is available to the defendant, whether the loss of the plywoods was attributed to such peril or alternatively, attributed to the act of God.

Held:

(1) It cannot be accepted that an outward manifest is a similar document of title as that of a bill of lading as argued by the counsel for the defendant. A manifest, in the case of merchant vessel, is a list of goods making up her cargo with the name of the shippers. For the Rules to apply there must be a contract of carriage covered by a bill of lading or any similar document of title. For a document to be a similar document of title to that of a bill of lading the document must satisfy at least the following requirements, that is to say, firstly it must be issued by the carrier to the shipper, secondly the document must contain the name of the shipper and the consignee and the description of the goods to which the contract of carriage relates and thirdly there must be acknowledgment by the carrier of the receipt of the goods specified therein. No such characteristic or attribute is present in the outward manifest relied on by the defendant. There is also no evidence adduced before this court to show that the outward manifest was issued by the owner of the vessel to the plaintiffs as

a document of title. The carriage of the crates of plywood in this action is not a contract of carriage within the meaning the said Rules, to which the 1960 Regulation apply. The defendant is therefore precluded from pleading peril of the sea as a defence (see p 346B–E).

(2) The defence of the act of God can only be invoked where the damage or loss is solely attributable to natural causes independent of any human intervention. The grounding of the vessel MV Soon Yu is not an accident which is due to natural cause, directly and exclusively without human intervention which could not by any amount of human care and skill have been resisted. The change in the weather condition is gradual and it is reasonably to be expected from DW2 to resist the change in the weather by steering the vessel towards the shallow water off the coast when the weather is reasonably expected to get worse. It is the court's finding that the loss of the crates of plywood on board the defendant's vessel MV Soon Yu was the direct consequence of the master's negligence in maneuvering the vessel and the negligence of the salvors in carrying out the salvage operation after the vessel was grounded (see pp 346H, 348C–D, 349C).

[**Bahasa Malaysia summary**

Plaintif-plaintif menuntut gantirugi dari defendan bagi jumlah RM70,702 bersama faedah bagi kehilangan kargo yang terdiri dari 38 kotak papan lapis. Kargo yang hilang itu merupakan sebahagian dari konsainan papan lapis yang diaturkan oleh plaintif pertama untuk dihantar di atas vesel defendan, MV Soon Yu ('vesel tersebut'), dari Miri ke plaintif kedua di Labuan. Plaintif-plaintif mendakwa bahawa defendan telah memungkiri perjanjian yang dipersetujui oleh mereka kerana gagal menyampaikan 38 kotak papan lapis kepada plaintif kedua atau memulangkan yang sama kepada plaintif. Defendan bergantung secara khusus kepada pembelaan bahaya di lautan atau sebagai alternatif, bencana alam. Isu-isu yang dibangkitkan ialah sama ada: (i) pembelaan bahaya lautan seperti yang terdapat dalam Peraturan-peraturan Perkapalan Saudagar (Penguatkuasaan Konvensyen berkenaan Pengangkutan Barangan di Laut dan Liabiliti Pemilik Kapal dan Orang Lain) 1960 ('Peraturan-peraturan 1960') serta Peraturan-peraturan Berkenaan Bil Muatan ('Peraturan tersebut') seperti yang terdapat di Jadual kepada Peraturan-peraturan boleh digunakan dalam kes ini; dan (ii) jika pembelaan sedemikian boleh digunakan oleh defendan, sama ada kehilangan papan lapis itu boleh dikatakan berpunca dari bahaya tersebut atau sebagai alternatif, dari bencana alam.

Diputuskan:

(1) Ia tidak boleh diterima bahawa satu manifes luar adalah satu dokumen hakmilik yang serupa dengan bil muatan seperti yang

dihujahkan oleh peguam defendan. Satu manifes, dalam situasi vesel saudagar, merupakan satu senarai barang-barang yang menjadi kargonya dengan nama pengkapal. Untuk memakai Peraturan tersebut, satu kontrak pengangkutan bersama bil muatan atau dokumen hakmilik yang serupa mestilah wujud. Bagi sesuatu dokumen menjadi dokumen hakmilik yang serupa dengan bil muatan, dokumen itu mestilah memenuhi sekurang-kurangnya keperluan-keperluan berikut, iaitu, pertama, ia mestilah dikeluarkan oleh pembawa kepada pengkapal, kedua, dokumen itu mestilah mempunyai nama pengkapal dan penerima dan deskripsi barang-barang yang dirujuk kontrak pengangkutan tersebut dan ketiga, mestilah adanya pengakuan dari pembawa resit barang-barang yang dinyatakan di dalam. Tiada ciri-ciri tersebut wujud dalam manifes luar yang dipakai oleh defendan. Juga tiada keterangan yang dikemukakan di hadapan mahkamah ini untuk membuktikan bahawa manifes luar tersebut dikeluarkan oleh pemilik vesel kepada plaintif-plaintif sebagai satu dokumen hakmilik. Pengangkutan kotak-kotak papan lapis dalam tindakan ini bukan kontrak pengangkutan dalam maksud Peraturan tersebut, yang dipakai oleh Peraturan-peraturan 1960. Defendan, oleh itu, dikecualikan dari merayu bahaya di lautan sebagai pembelaan (lihat ms 346B–F).

(2) Pembelaan bencana alam cuma boleh dikemukakan di mana kerugian atau kehilangan berpunca hanya dari kejadian semulajadi dan bebas dari campurtangan manusia. Vesel MV Soon Yu terkandas bukan kerana satu kemalangan yang berpunca dari kejadian semulajadi secara langsung dan bebas dari campurtangan manusia dan tidak dapat dielakkan walaupun adanya pemeliharaan dan kemahiran manusia. Perubahan dalam cuaca itu adalah secara berperingkat dan ia wajar diharapkan dari SD2 yang beliau akan menentang perubahan cuaca dengan memandu vesel ke perairan cetek di luar pantai apabila cuaca kelihatan akan bertambah buruk. Mahkamah mendapati bahawa kehilangan kotak-kotak papan lapis dari vesel defendan MV Soon Yu adalah akibat langsung kecuaian ketua dalam mengemudikan vesel tersebut dan kecuaian penyelamat dalam menjalankan operasi menyelamat setelah vesel tersebut terkandas (lihat ms 346H, 348C–D, 349C).]

Notes

For cases on carriage of goods, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1013–1209.

Cases referred to

Hill v Scott [1895] 2 QB 371 (refd)
Liver Alkali Company, The v Johnson (1874) LR 9 Ex 338 (refd)

Ludditt & Ors v Ginger Coote Airways Ltd [1947] 1 All ER 328 (refd) A
Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd [2000] 5 MLJ 721 (refd)

Legislation referred to

Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 B

Un Peir Liang (*Jimmy H T Wee & Co Advocates*) for the plaintiff.
K Y Lin (*Louis Achok* with him) (*Kadir, Wong, Lin & Co Advocates*) for the defendant. C

Sulaiman Daud JC:. The plaintiffs claim damages against the defendant in the sum of RM70,702, together with interest thereon, for the loss of cargo comprising 38 crates of plywood. The lost cargo was part of the consignment of plywood arranged by the first plaintiff to be shipped on board the defendant's vessel, MV Soon Yu, from Miri destined for the D second plaintiff at Labuan. There were two such shipments. In the first shipment, the first plaintiff forwarded 44 crates of which 37 crates were received by the second plaintiff leaving a short shipment of 7 crates. Another 31 crates were shipped on board the same vessel which set sail from Miri to Labuan at 0100 hours on 17 January 1994. When the vessel E departed Miri on that day, the weather was normal but at about 1430 hours, the vessel encountered rough seas. The master of the vessel steered the vessel towards the shallow water where she ran aground at about 1830 hours approximately 0.5km off the coast of Lumut, Bandar Seri Begawan. The master informed the owner of the vessel about the incident at about 2345 hours on the same day. The first salvage operation was carried out on F 28 January 1994, where the salvor, Yang Yang Shipping, only managed to transship the on-deck cargo to the salvage barge. During such operations, the aft hatch covers were opened to facilitate the discharge of other cargo, including the plywoods, in the cargo hold. As the vessel and the cargo hold were constantly swamped by heavy breakers, the salvor suspended further salvage operations at about 1900 hours until daylight the following day. G Unfortunately during the night the consignment of plywood in crates stowed in the vessel's cargo hold were swept away.

The plaintiffs alleged that the defendant, in breach of the agreement entered between them or of its duty as bailee, failed to deliver 38 crates of plywood to the second plaintiff, or to return the same to the first plaintiff. H The plaintiffs also pleaded negligence on the part of the defendant in handling, storing or managing the cargo before or during the course of the voyage, or when the vessel was grounded or during salvage operations. The defendant specifically relied on the defence of peril of the sea, or alternatively of the act of God.

The facts of the case as set out above, gave rise to following issues for I determination, that is, firstly whether the defendant can resort to the defence of peril of the sea; secondly, if such defence is available to the

defendant, whether the loss of such plywoods was attributed to such peril or alternatively, attributed to the act of God; and thirdly whether the seven crates of plywood which were short shipped in the first shipment were on board the vessel when it ran aground.

Liability of a common carrier of goods

It is not disputed that the defendant operated the vessel MV Soon Yu for the carriage of goods for reward, and is therefore a common carrier. The liability of a common carrier of goods has long been settled. Lord Wright in delivering the judgment of the Judicial Committee of the Privy Council in the case of *Ludditt & Ors v Ginger Coote Airways Ltd* [1947] 1 All ER 328, stated at p 329 as follows:

> By the custom of the realm a common carrier of goods was at common law bound to answer for the goods at all events … The law charges this person thus entrusted to carry goods against all events but acts of Gods, and of the enemies of the King (LR 4 QB 379 at p 382).

In the case of *Hill v Scott* [1895] 2 QB 371, Lord Russel of Killowen CJ, in discussing the liability of a common carrier, stated at p 376:

> ... every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of Gods or the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or particular voyages, he limits his liability by further exceptions.

The shipowner's liability as a common carrier is further explained in *Halsbury's Law of England*, Vol 43, at p 282 as follows:

> If goods are shipped in a general ship without any express contract being made or under any contract to which the Carriage of Goods by Sea Act does not apply, and which does not contain any stipulations relieving the shipowner from liability for loss of or damages to the goods, he impliedly undertake to carry them at his own absolute risk.

Having stated the law as to the shipowner's liability as a common carrier, I will now proceed to consider the defence of the defendant as pleaded. The question is whether in the contract for such carriage made orally between the parties, there was any stipulation, express or implied, the effect of which was to limit the defendant's liability. It is not disputed that such carriage was neither covered by a bill of lading nor an insurance policy. The learned counsel for the plaintiffs contended that there was no such stipulation, and as such, he submitted the defendant can only resort to the defence of act of God.

The learned counsel for the defendant contended that the defendant's case in the present action comes under the exceptions of the rule of strict liability by virtue of the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 ('the 1960 Regulations'). By reason thereof, he submitted that the defendant was exempted from liability by virtue of art IV of the Rules Relating To Bills of Lading ('the said Rules') as set out in the

schedule to the 1960 Regulations, because the loss of the cargo was due to very rough seas and bad weather which, according to him, constitutes the defence of the peril or the danger of the sea. The learned counsel for the plaintiffs on the other hand, submitted that the 1960 Regulations did not apply in the present action because the carriage was not subject to any bill of lading, and that the outward manifest in respect of the goods was not 'a similar document of title' within the meaning of the said Rules. The question is whether or not the defence of peril or danger of the sea as provided in the 1960 Regulations and the said Rules apply to the present action.

Whether the defence of 'peril of the sea' is available to the defendant

The issue raised involves consideration of certain related provisions of the 1960 Regulations and the said Rules. Regulation 2 thereof provides that subject to the provisions of this part, the Rules set out in the schedule shall have effect to and in connection with carriage of goods by sea in ships carrying goods from any port in Sarawak to any other port, whether in or outside Sarawak. Regulation 4 requires every bill of lading or similar document of title issued in Sarawak which contains or is evidence of any contract to which the Rules apply, to have an express statement, that it is to have effect subject the provisions of the Rules as applied to this Part. What is the effect of this reg 4? Whether for such Rules to apply, there must be endorsed on such bill of lading or such similar documents the express statement as stipulated in the said reg 4? Upon perusal thereof, in my opinion, such provisions are merely directive, requiring every bill of lading or such document of title to contain such statement without imposing any penalty or adverse effect in case of non compliance. I am also of the view that the absence of such statement from any bill of lading or other similar document will not in any way deprive the holder thereof from enjoying the protection or right and immunities against risk as provided under the said Rules. This interpretation is relevant to one of the issues raised by the learned counsel for the plaintiffs, which will be dealt with in the course of this judgment.

The Rules referred to in the 1960 Regulations, and as provided in the schedule thereto are 'the Rules Relating To The Bills Lading'. Article II of the Rules provides that under every contract of carriage of goods by sea, the carrier, in relation to the loading, handling, stowage, carriage, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth. Such responsibilities and liabilities are provided in art III of the Rules, and the rights and immunities are provided in art IV thereof. The provisions of the said art IV in so far as relevant to the present action are contained in para 2(c) and (d) thereof and are as follows:

> 2 Neither the carrier nor the ship shall be responsible for loss or damages arising or resulting from:
>
> (a) …;
>
> (b) …;

(c) perils, danger and accidents of the sea or other navigable waters;

(d) act of God;

(e) …;

As provided in art 2 of the Rules, the right and immunities set forth above is only applicable in relation to *contract of carriage* of goods by sea (Emphasis added). The expression 'contract of carriage' therein is defined in art 1 of the Rules and is as follows:

> 'contract of carriage' *applies only to contracts of carriage covered by a bill of lading or any similar document of title* (Emphasis added), in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar documents as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

The learned counsel for the defendant, having admitted that the carriage of the said crates of plywood was not covered by a bill of lading, argued that the outward manifest in respect of such goods is a document of title similar to that of the bill of lading. He further submitted that such manifest is an acknowledgement of titles to such goods wherein the name of the shippers and consignees are clearly stated. Such document is also recognized as a document of title to such goods, and has to be submitted to the customs department before the vessels depart Miri. The learned counsel cited the case of *Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd* [2000] 5 MLJ 721 where one of the points at issue was whether a shipping order was a document of title. It was held that such shipping order was as good as being a document of title, for without it the plaintiff, being the consignee as well as the shipper, would not be able to claim the cargo from the defendant shipping company. In support of his finding, Ian Chin J stated at p 729:

> This is especially so when a shipping order also has the other important attributes of a bill of lading like an acknowledgement by the shipping company that the cargo had been received in apparent good condition and that it had been shipped by the consignor. It also, just like a bill of lading, states the destination and description of the cargo.

What then is a bill of lading? *Halsbury's Law of England* (4th Ed) Vol 41, at para 946, defines Bill of lading as follows:

> A bill of lading is a receipt for goods delivered to and received by a ship, signed by the person who contracts to carry them, or his agent and evidencing the term of the contract of carriage under which the goods have been so delivered and received ….

In *Modern Bills of Lading* (2nd Ed) Blackwell Law, the function of bill of lading is summarized as follows:

> The bill of lading continues to serve its original function, as receipt from the carrier for the goods. If it is a clean shipped bill it will also state that the goods have been loaded aboard his vessel, in apparent good order and condition …. From being a receipt from the carrier for the goods, the bill of lading evolved into a document of title (so long as it is expressly made negotiable by the

shipper). Negotiability became an important feature of the document. As a document of title:

(a) it represents the goods to make it possible for the buyer to deal with the goods at sea;

(b) it transfers constructive possession of the goods;

(c) it may operate to transfer property in the goods.

From my understanding on the bill of lading as illustrated above, I cannot with respect agree with the contention of the learned counsel for the defendant that an outward manifest is a similar document of title as that of a bill of lading. A manifest, in the case of a merchant vessel, is a list of goods making up her cargo with the name of the shippers (see *Jowitt's Dictionary of English Law*). For the said Rules to apply, there must be a contract of carriage covered by a bill of lading or any similar document of title. In my view, for a document to be a similar document of title to that of a bill of lading, the said document must satisfy at least the following requirements, that is to say, firstly, it must be issued by the carrier to the shipper, secondly, the document must contain the name of the shipper and the consignee and the description of the goods to which the contract of carriage relates and thirdly, there must be acknowledgment by the carrier of the receipt of the goods specified therein. It is clear to me that the shipping order referred to in the last mentioned case has all the attributes of a bill of lading for the learned judge to arrive at the finding that he made. No such characteristic or attribute is present in the outward manifest relied on by the defendant. There is also no evidence adduced before this court to show that the outward manifest was issued by the owner of the vessel to the plaintiffs as a document of title.

For the reasons aforesaid, it is my finding that the carriage of the crates of plywood in this action is not a contract of carriage within the meaning the said Rules, to which the 1960 Regulations apply. The defendant is therefore precluded from pleading peril of the sea as a defence. The learned counsel for the plaintiff further contended that even if the outward manifest is a similar document of title, the said Rules are still not applicable since no endorsement as required in reg 4 of the 1960 Regulations was made thereon. It is not necessary for me to dwell on this contention further as I have already given my finding thereon while discussing the effect of the said reg 4 earlier in the judgment.

Whether the damage or loss is due to the act of God

Having made the aforesaid finding, I will consider the alternative defence of the defendant. In the absence of any express stipulations in any contract, a carrier is allowed to invoke the four common law exceptions of the act of God, Queen's enemies, inherent vice, and a general average sacrifice. The exception of the act of God can only be invoked where the damage or loss is solely attributable to natural causes independent of any human intervention. A common carrier is not liable for any accident as to which it can show that the accident was due to the natural causes directly and exclusively, and not to human intervention, and that it could not have been

prevented by any amount of foresight, pain and care reasonably to be expected from him (see John Wilson, *Carriage of Goods By Sea* (2nd Ed) Pitman Publishing at pp 249–250). In the case of *The Liver Alkali Company v Johnson* (1874) LR 9 Ex 338, where a vessel ran aground in a fog without any negligence of the shipowner, it was held that the defence of the act of God was not available and the fact that the shipowner was in no way negligent was not material.

In the legal sense the term, the act of God may be defined as an extraordinary occurrence or circumstances which could not have been foreseen and which could not have been guarded against, or more accurately as an accident (1) due to natural causes directly and exclusively without human intervention (2) which could not by any amount of ability have been foreseen, or, if foreseen, could not by any amount of human care and skill have been resisted (see *Halsbury's Laws Of England* (4th Ed) Vol 9 at p 323.)

Having stated the law, I will relate it to the facts and circumstances of the case to determine whether the defendant can succeed in the defence of act of God. With regard to the grounding of the vessel, the learned counsel for the plaintiff submitted that the accident was not due to an act of God because there were human elements involved which contributed to the grounding of the vessel and ultimately to the loss of the plywoods. The weather was not the sole cause. The learned counsel argued that there was no log book referred to anywhere to record the contemporaneous account of the weather condition. The only witness to the weather condition was DW2, the master of the vessel, who testified that there was 'heavy waves and strong winds' in his examination in chief. In the maritime consultant report it was reported that the waves were about 6 feet to 8 feet and winds up to force 4 on the Beaufort Scale. In cross examination, he testified that force 4 winds have speeds of about 40 nautical miles per hour. The learned counsel submitted such assertions were not consistent with that specified in the *New Encyclopedia Britannica* which clearly sets out that force 4 winds are moderate breezes with wind speeds of 11–16 nautical miles. The learned counsel further contended that DW2 had ample time to take precautionary measures, or to alter course because the change in the weather was gradual. It is reasonably expected for DW2 at that time to resist the weather but instead he chose to proceed with the journey without taking any precautionary measures until the vessel could not move further due to heavy waves and strong winds.

The learned counsel for the defendant, on the other hand, submitted that the cause of the accident was exclusively due to strong winds and heavy waves which are the natural causes. The vessel was listed 40 degrees and she was in immediate danger of sinking. In order to save the lives of the crew, the master of the vessel had no other option but to divert the vessel towards the shallow water where it was grounded. The learned counsel submitted that it cannot be said that the grounding of the vessel was partly attributed by the fault or neglect of the master, since at the time he diverted the vessel towards the shallow water, she was already in immediate danger of sinking.

It was his contention that the grounding of the vessel was solely attributed to the heavy waves and strong winds. A

Finding on the grounding of the vessel

DW2, the master of the vessel, testified that he encountered heavy seas at about 12 nautical miles from the beach, but he still proceeded with the voyage until the vessel could not move further. He also testified that the weather started to change at noon and got worse at 1400 hours, and when he noted that the vessel was in danger of sinking and for the safety of all concerned, he steered the vessel towards the shallow water, where it was grounded 0.5 nautical miles from the dry shore. Based on the evidence before me, it is my finding that the grounding of the vessel was not an accident which was due to natural causes, directly and exclusively without human intervention which could not, by any amount of human care and skill, have been resisted. The change in the weather condition was gradual and it was reasonably expected from DW2 to resist the change in the weather by steering the vessel towards the shallow water off the coast when the weather was expected to get worse. Any reasonable master would have immediately changed the course of the vessel and steered towards safe waters as soon as the weather conditions started to change for the worse. I am also of the view that the grounding of the vessel was also not the direct consequence of the strong winds and rough seas, but was also attributed to the act of DW2 in manoeuvring the vessel. The fact that he had never performed a vessel grounding manoeuvre before, or had any training in such manoeuvre further fortified my finding that the grounding of the vessel was partly attributed to the master's negligence in handling and manoeuvring the vessel in such weather conditions. On the force 4 winds, I accepted the interpretation as submitted by the learned counsel for the plaintiff that it was only a moderate breeze with wind speeds of 11–16 nautical miles per hour.

On the salvage operations, it is also my finding that there was a chain of human intervention and action which led to the loss of the plywood crates. There were such acts or measures which could have been reasonably carried out by the salvors to prevent the loss of the plywoods during the salvage operations. DW3 testified that after the deck cargo was removed on 28 January 1994, the hatch covers were opened to facilitate the discharge of other cargo, including the plywoods, in the cargo hold. However due to rough sea, the salvage operations could not be continued but had to be suspended until daylight the following day. According to DW3, he had put the hatch covers back in place when the salvage operations were suspended for the day, and covered the same with tarpaulin cloth which was fastened with rope. It is without doubt that when DW3 put the hatch covers back on that day, the crates of plywood must necessarily be in the cargo hold together with other cargo therein, as no plywood was seen to have been washed away therefrom when the hatch covers were opened. What could have caused the crates of plywood in the cargo hold to be washed away during the night after the first day of the salvage operation? It is obvious to

me that the crates of plywood must have escaped from the cargo hold after its hatch covers were forced opened by the strong waves during the night when the salvage operations were suspended. DW3 who closed the hatch covers should have foreseen such a possibility if the hatch covers were not properly secured and fastened to their original positions after they have been opened. It must have been clear to him that there were strong waves, and unless the hatch covers were properly fastened and secured to withstand such bad weather, he could have foreseen that they could be ripped open and caused the escape of the cargo in the cargo hold. In other words, such escape could have been prevented or resisted had DW3 used reasonable care and skill in securing and fastening the hatch covers after they were opened.

Accordingly, it is my finding that the loss of the crates of plywood on board the defendant's vessel, MV Soon Yu, was the direct consequence of the master's negligence in manoeuvering the said vessel, and the negligence of the salvors in carrying out the salvage operations after the vessel was grounded.

Whether the seven missing crates were on the grounded vessel

From the outward manifest, it is obvious that there were only 31 crates of plywood consigned to the second plaintiff. The defendant failed to prove that the 7 crates of plywood that were short shipped during the first shipment (voyage 1/94) were on board the vessel, MV Soon Yu, that was grounded (voyage 2/94). As such, I hold that the plaintiff is only entitled to damages in respect of the 31 crates of plywood as stated in the outward manifest for voyage 2/94, in the sum of RM58,032, together with interest at the rate of 8% pa from the date of judgment to the date of full recovery.

With respect to costs, I accepted the argument put forward by the learned counsel for the plaintiff that the first plaintiff was made a party to this action as there was uncertainty as to when the right in the plywood passed from the first plaintiff to the second plaintiff. However, since the director of the second plaintiff himself admitted that the plywoods already belonged to the second plaintiff upon payment, it may not be necessary for the second plaintiff to commence this action together with the first plaintiff. In the circumstances, I only award costs to the second plaintiff to be taxed unless otherwise agreed.

Order accordingly.

Reported by Benjamin Yong